TIMUR PERMAI HOLDINGS SDN BHD

v.

SOON SENG PLYWOOD & TIMBER SDN BHD (NO 2)

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: 22-30-1996]
14 JANUARY 1997

CONTRACT: *Sale and purchase of land - Conditional contract - Whether term of contract promissory condition or condition condition - Breach of such conditions - Effect of*

CONTRACT: *Sale and purchase of land - Specific performance - Whether specific performance can be granted to compel one party to fulfil terms of the agreement*

The plaintiff claimed specific performance based on a sale and purchase agreement ('the agreement') averting that the defendant had acted in breach of its obligations and was not justified in terminating the agreement on the ground that the relevant consent was not obtained within 18 months from 22 May 1994. The defendant contended that there was no contract in the first place, there being a restriction-in-interest on the land.

Among the issues that arose for consideration were: (i) the intention of the contracting parties and whether upon a proper construction of cl 4 of the agreement, the defendant was in breach. Clause 4 of the agreement dealt with the application for consent and sub-division of the land, the operative words being "the vendor shall ... obtain the consent ..."; (ii) the defendant's implied duty; and (iii) whether specific performance could be granted.

Held:

[1] In construing the provisions of an agreement, the court will strive to give business efficacy and validity to the agreement, and therefore to hold it legally enforceable, rather than to declare it null and void. A contract is always entered into by the contracting parties for a specific purpose; a contract does not exist in vacuum.

[1a] The plain and ordinary language used in the agreement, especially cl 4(a), showed the parties' intention to which the court must give effect. The crucial words "the vendor shall obtain the consent" connoted the imperative and pre-emptory intention of the parties and the compulsory duty imposed upon the vendor who was obliged to obtain the relevant

consent within 18 months from 22 May 1994. Clause 4(a) of the agreement therefore created a promisory condition, as opposed to a contingent condition.

[1b] A promisory condition is a promise or assurance for the non-performance of which a right of action accrues to the innocent party. It was mandatory therefore for the defendant to obtain the relevant consent within the 18 months, failing which the defendant would be in clear breach.

[2] The defendant had the implied duty of co-operating reasonably to ensure the performance of its respective obligations; to take reasonable and necessary steps to apply for and follow-up on the application with a view to obtaining the relevant consent.

[2a] The onus of proving that the defendant had taken all reasonable steps to fulfil its implied duty laid on the defendant. In this context, the reasonable steps were: (i) to make a proper and complete application for sub-division; (ii) to make the application promptly; and (iii) to take all reasonable steps to follow-up on the application. On the facts of the case, the defendant had breached its implied duty.

[3] The plaintiff had at all material times fulfilled his obligations under the terms and conditions of the agreement. It was imperative and mandatory for the defendant to obtain the relevant consent but the defendant had failed to do so or at most had submitted the application in a cavalier and lackadaisical manner in order to render the whole exercise self-defeating in that the material particulars as required by the State Authority was deliberately or otherwise omitted by the defendant. The court therefore could order specific performance to compel the defendant to fulfil the terms and conditions undertaken by the defendant. However, since the court would be unable to determine whether the defendant would be able to perform its obligations under the agreement to obtain the relevant consent, it was therefore necessary to make an order for specific performance that was conditional upon obtaining the relevant consent.

Cases referred to:
Chin Tai v. Siow Shiow & Ors [1971] 1 MLJ 67 ***(refd)***
Chong Hoong & Anor v. Wong Yuen Sang [1976] 1 MLJ 282 ***(refd)***
Faber Merlin (M) Sdn Bhd & Ors v. Lai Thai Sang & Anor [1985] 2 MLJ 381 ***(refd)***
Goo Hee Sing v. Will Raja [1994] 1 CLJ 255 ***(refd)***
Halimah binti Abdul Rahman v. Fatimah binti Abdullah [1976] 2 MLJ 64 ***(refd)***
Hasham v. Zenab 16 [1960] AC 316 ***(foll)***

Hassan v. Ismail [1970] 1 MLJ 210 ***(refd)***
Jaafar bin Ibrahim v. Gan Kim Kin [1985] 2 MLJ 24 ***(foll)***
Loke Koon Moy & Anor v. Zaibun Sa binti Syed Ahmad [1978] 2 MLJ 29 ***(foll)***
National Land Finance Co-Operative Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76 ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Loo & Sons Realty Sdn Bhd & Yang Lain [1996] 3 AMR 3484 ***(refd)***
Reardon Smith Line Ltd v. Hansen – Tangen [1976] 3 All ER 570 ***(refd)***
Zaibun Sa Syed Ahmad v. Loke Koon Moy & Anor [1982] 2 MLJ 92

Legislation referred to:
Contracts Act 1950, s. 33(a)
Evidence Act 1950, s. 114(g)
National Land Code 1965, s. 136(1)(p)
Specific Relief Act 1954, s. 11(2)

Other sources referred to:
Chitty on Contracts, 27th edn, vol I, p 751
Principles of Equitable Remedies, ICF Spry, 3rd edn, p 96

For the plaintiff - S Selvarajah (Derek Fernandez & S Seenivasagam with him); M/s Azariah & Assoc
For the respondent - RR Sethu (En Balasingam with him); M/s Balasingam & Co

Reported by Mariette Peters-Goh

JUDGMENT

Low Hop Bing J:

Prelude

On 26 April 1996, I granted an interlocutory injunction restraining the defendant, its servants and/or agents from dealing with or giving effect to any dealings with the land known as Geran No. P.N. 7111, Lot No. 26566, Mukim Kapar, Selangor Darul Ehsan.

In granting the injunction, I also held that "oral evidence must be adduced to determine the intention of the parties and the contractual obligations undertaken by them to bring about the obtaining of the relevant consent, and whether the defendant had acted in breach of its implied duty. There was no appeal against my said decision.

Plaintiff's Claim

In this suit, the plaintiff is claiming for specific performance, based on the sale and purchase agreement dated 23 March 1994 ('the agreement'). The plaintiff avers that the defendant had acted in breach of its obligations under cl. 4 and was not justified in terminating the agreement on the grounds that the relevant consent was not obtained within 18 months from 22 May 1994. The plaintiff's learned counsel submitted that cl. 4 constituted a promissory condition, a breach of which entitled the plaintiff to specific performance and/or damages.

Defendant's Contention

In response, the defendant's counsel stated that there was no contract in the first place. Further, according to him, the restriction in interest placed on the title to the land says that "Tanah yang diberimilik ini tidak boleh dijual, ... atau dipindahmilik dengan apa cara sekali pun melainkan dengan kebenaran Pihak Berkuasa Negeri" ("The land hereby alienated cannot be sold, ... or transferred, except with the consent of the State Authority"). This restriction, adds learned counsel, made a distinction between "sale" and "transfer" and since the agreement refers to the transfer of the subdivided portion, the consent of the State Authority is necessary for the entry or enforceability of the agreement; and since no consent has been obtained, the agreement is not legally enforceable.

The defendant's learned counsel relied on *Goh Hee Sing v. Will Raja* [1993] 3 MLJ 610 HC for the proposition that since the purported deed of sale there made no reference to the restriction in interest, the purchaser's caveat was a nullity and hence there could be no specific performance.

Reliance was also placed on *Perwira Habib Bank Malaysia Bhd v. Loo & Sons Realty Sdn Bhd & Yang Lain* [1996] 3 AMR 3484 for the proposition that the purchaser, the second respondent, was entitled to consider the sale and purchase agreement as terminated, because the consent of the State Authority had not been obtained. Hence, it was contended for the defendants that no rights in equity could arise in the absence of the relevant consent of the State Authority to the transfer. There is nothing enforceable until then.

Decision Of The Court

Intention Of The Contracting Parties

The issue before me is to ascertain the intention of the parties to the agreement in order to determine whether, upon a proper construction of cl. 4(a) in particular and cl. 4 in general, the defendant is in breach of the agreement. In this connection, I must decide on the parties' respective rights and obligations by reference to the express provisions of the agreement: *Faber Merlin (M) Sdn Bhd & Ors v. Lai Thai Sang & Anor* [1985] 2 MLJ 381 SC. In construing the provisions of the agreement, I must strive to give business efficacy and validity to the agreement, and therefore to hold it legally enforceable, rather than to declare it null and void. A contract is always entered into by the contracting parties for a specific purpose; a contract does not exist in a vacuum. In *Reardon Smith Line Ltd v. Hansen – Tangen* [1976] 3 All ER 570, Lord Wilberforce stated as follows:

> No contracts are made in a vacuum; there is always a setting in which they have to be placed ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the contexts, the market in which the parties are operating.

In the case before me, the specific intention of the parties to the agreement can be gathered from the express words used by the parties in the agreement as a whole, in particular cls. 4 and 11. Clause 4 reads as follows:

> **Application for Consent and Sub-Division of Land**
>
> (a) The Vendor shall, not later than Eighteen (18) months from the date of payment of the sum stated in Section 1(b) of the Second Schedule, obtain the Consent for subdivision of the said land and the Consent to transfer to the Purchaser (hereinafter referred to as "the Consent");
>
> (b) In the event the Vendor fails to obtain the Consent within the time as stipulated in Clause 4(a) above, the Purchaser on receipt in writing for an extension of time to obtain the Consent shall grant the extension in writing to the Vendor as stipulated in the Third Schedule Section 1(b);
>
> (c) In the event the Vendor seeks and obtains the extension stated in Clause 4(b) above, the Vendor shall pay an interest of eight per centum (8%) per annum on a daily basis on the deposit sum to the Purchaser as compensation deductible from the rental to be paid by the Purchaser pursuant to the Tenancy Agreement between the same parties.

The plain and ordinary language used in the agreement, especially cl. 4(a), manifests the parties' intention to which the court must give effect. The crucial words in cl. 4(a) are: "The Vendor shall ... obtain the consent". It connotes the imperative and peremptory intention of the parties and the compulsory duty imposed upon the vendor who is obliged to obtain the relevant consent within 18 months from 22 May 1994. In my judgment, cl. 4(a) creates a promissory condition, as opposed to a contingent condition.

A promissory condition has been defined by *Chitty on Contracts*, 27th Edn Vol. I, to be a promise or assurance for the non-performance of which a right of action accrues to the innocent party. At p. 751 Chitty states as follows:

> A condition in the sense mentioned above may conveniently be termed a 'promissory' condition, being a promise or assurance for the non-performance of which a right of action accrues to the innocent party. This sense must be carefully distinguished from that of a 'contingent' condition, ie, a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfilment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties.

This statement was adopted by the Supreme Court in *Jaafar bin Ibrahim v. Gan Kim Kin* [1985] 2 MLJ 24 at p. 29 where Mohamed Azmi SCJ held as follows:

> Further a distinction should be made between 'promissory' condition and 'contingent' condition – the former being a promise or assurance for the non-performance of which a right of action accrues to the innocent party, and in the latter case the non-fulfilment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties (see *Chitty on Contracts*, 25th Edn, p. 751, para 752).

In my considered view, the word "obtain" in cl. 4(a) of the agreement goes further than just "apply". One can apply for but fails to obtain the consent, but in all cases one must apply and apply properly in order to obtain consent. The usual standard clause in a contract for the sale of land subject to a restriction in interest is to the effect that the vendor shall apply or shall make an application (see *National Land Finance Co-Operative Ltd v. Sharidal Sdn Bhd* [1983] 2 MLJ 211, 214) for consent within a stipulated period and if the consent is not obtained within the time frame, then the contract shall be deemed null and void and of no further force or effect (see *Jaafar bin Ibrahim v. Gan Kim Kin* [1985] 2 MLJ 24 at p. 25). In the instant case, there is no clause in the agreement to render the agreement null and void in the event the relevant consent is not obtained within the first 18 months from 22 May 1994, nor is the word "apply" ever used therein.

Under the agreement, the parties have contemplated that the relevant consent would be obtained as a matter of course, within the time frame as envisaged in cl. 4. This is because the entire agreement did not contain any clause giving the defendant (ie, the vendor) the right to terminate the agreement in the event of the defendant's failure to obtain the relevant consent within the first 18 months. Under the promissory condition as contained in cl. 4(a), the defendant cannot purport to terminate the agreement by refusing to apply for an extension of time to obtain the consent, under cl. 4(b). Instead, cl. 4(b) makes it mandatory for the purchaser to grant to the vendor an extension of 18 months, should the vendor fail to obtain the consent in the first 18 months. There is no provision for termination after the lapse of the first 18 months.

In the event that the defendant fails to request and/or decides that it does not need an extension of time, it is mandatory for the defendant to obtain the relevant consent within the first 18 months, failing which the defendant will be in clear breach of cl. 4(a). The defendant can avoid being in breach of cl. 4(a) by exercising his rights under cl. 4(b) ie, by seeking an extension of time for a further period of 18 months, which the plaintiff cannot refuse to grant. There is however a price to be paid for this extension in that, according to cl. 4(c), the defendant must pay an interest of 8% per annum on the deposit sum of RM490,050 as compensation deductible from the rental paid by the plaintiff to the defendant pursuant to the Tenancy Agreement executed by the same parties. This Tenancy Agreement provides for a 36-month tenancy and coincides with the 36-month period under cl. 4(a) and (b). These two agreements are concurrently discussed, negotiated and concluded.

The time frame for obtaining the consent within the first 18 months expired on 22 November 1995. However, by October 1995, the defendant had still not obtained the consent. The plaintiff by a letter dated 5 October 1995 granted an extension of time to the defendant "pursuant to the agreement". The letter was received by the defendant on 14 October 1995. Although the expiry date of the first 18 months, as stated above, was on 22 November 1995, the defendant did nothing. The defendant through DW1 testified that the defendant did not accept the plaintiff's offer for extension. The defendant by its solicitor's letter dated 30 November 1995 instead purportedly terminated the agreement. The defendant remained silent for 45 days before the purported termination. The first time the defendant ever made any reference to the question of not requiring the extension of time was in its solicitor's letter dated 29 December 1995 to the plaintiff's solicitors and this was 75 days after the defendant had received the plaintiff's letter granting the extension of time.

In the instant case, there has been no rejection by the State Authority of the application for the relevant consent. On the contrary, the evidence of PW4 En. Masri bin Jaafar, a Land Administrator from the Klang Land Office revealed that the application for sub-division is likely to be approved pending correction of the errors and omissions, which were in actual fact occasioned and caused by the defendant.

It is obligatory on the part of the defendant to use all efforts to obtain the consent and such efforts should include the exercise of the right by the defendant under cl. 4(b) in the event the relevant consent has not been obtained within the first 18 months for any reason whatsoever. The defendant has failed to fulfil this obligation.

In relation to the authority relied upon by the plaintiff, *viz Goh Hee Sing, supra,* I am of the view that that case touches on the caveatable interest of a prospective purchaser and his right to enter a caveat arising from a purported deed of sale which makes no reference to the restriction in interest in the said deed. The facts in *Goh Hee Sing* are clearly distinguishable from the facts of the case before me. In *Perwira Habib Bank, supra,* which was also relied upon by the defendant, from the recitals and cl. 2(a) of the sale and purchase agreement therein, it is evident that the agreement shall determine when the consent is not obtained, in which event all payments shall be refunded, and thereafter both parties have no further claims against one another, except in respect of antecedent breaches. Again, it is obvious to me that the facts in the *Perwira Habib Bank* case before the Court of Appeal are different from the facts of this case.

Clause 4, which remains crucial in this case, is nowhere to be found in either of the aforesaid two cases relied upon by the defendant herein who, in my judgment, had acted in breach of the promissory condition in cl. 4(a) in failing to obtain the relevant consent within 18 months, and by not seeking an extension of time to do so under cl. 4(b), the defendant is not relieved from liability for the breach.

Defendant's Implied Duty

Irrespective of whether cl. 4(a) is a promissory condition or a contingent condition, on the facts of this case, in my judgment, the following implied duties exist:

(1) an implied duty on the part of the plaintiff and the defendant to cooperate reasonably to ensure the performance of their respective obligations; and

(2) an implied duty on the part of the defendant to take reasonable and necessary steps to apply for and follow up on the application with a view to obtaining the relevant consent.

The onus of proving that the defendant had taken all reasonable steps to fulfil the implied duty lies on the defendant. In this context, the reasonable steps are as follows:

(a) making a proper and complete application for sub-division;

(b) making the application promptly; and

(c) taking all reasonable steps to follow up on the application.

The "yardstick" as to whether the defendant had taken all reasonable steps to obtain the relevant consent is based on an objective test i.e. what would a reasonable person, anxious to conclude a 4.9 million-ringgit sale in the shortest time, have done in the circumstances?

(a) Making Proper And Complete Application For Sub-Division

It is not disputed that the application form for sub-division (Borang 9A) which was submitted by or on behalf of the defendant was defective in three material particulars *viz:*

(i) the defendant has failed or omitted to date the application form when it was submitted;

(ii) the column in the application form for the inclusion of the name of the chargee bank was left blank at the time of submission; and

(iii) when the name of the chargee bank was subsequently filled in, the handwriting in pen was not initialled.

To date these material particulars have not been rectified by the defendant. In the circumstances the Land Office, through Encik Masri bin Jaafar, PW4, was unable to do anything in relation to the application. The Land Office had by a letter dated 11 January 1996 to the defendant requested that the defendant perfect the application by filling in all the material particulars and also to clarify the discrepancies between the letter from the bank dated 13 May 1994 and the letter from Jurukur Cekap dated 11 April 1994. All these defects on the part of the defendant's application have not been rectified by the defendant. The reason for the omission on the part of the defendant is only best known to the defendant. Such omission had clearly prejudiced the defendant's application, which, by any standard, cannot be treated as a proper application at all.

(b) Making Prompt Application For Sub-division

According to PW4, Encik Masri bin Jaafar from the Land Office Klang, the defendant submitted its application for subdivision on 21 June 1994 ie, almost one month after 22 May 1994 when the balance of 5% was paid. There was no explanation whatsoever for this delay, notwithstanding the fact that the defendant had already collected approximately RM250,000 prior to 23 March 1996. The defendant should have submitted or caused to be submitted the application when the balance of 5% was paid on 22 May 1994.

(c) Taking all Reasonable Follow-up Actions

Serious contradictions can be identified between the evidence of DW2, Lee Wen Loong, and DW4, Tan Woon Fatt, on the follow-up steps, to pursue the application, particularly on the number of visits to the Klang Land Office. Both these two witnesses are the defendant's employees.

DW2 stated that he and DW4 visited the Klang Land Office twice a month while DW4 testified that most of the time he went on his own. DW4 stated that only on two occasions, he went with DW2. Between August and October 1994, DW4 made no visits to the Land Office. From the evidence, I come to a specific finding of fact that the defendant did little or nothing as far as follow-up action is concerned. The cumulative effect of the evidence adduced for the defendant is to focus baseless allegations that the Land Office had misplaced the pre-comp plans. DW4 was allegedly informed on 5 October 1994 by one Ms Stella of the Klang Land Office that the "pre-comp plans were not found in the file." According to exh. TEK2, Ms Stella confirmed on 15 October 1994 that the pre-comp plans were missing and requested DW4 to resubmit new sets of plans and that on 22 November 1994, Jurukur Cekap resubmitted 8 sets of pre-comp plans to the Land Office. However, according to PW4, Encik Masri bin Jaafar, no documents were missing from the Land Office file. I am unable to find any evidence to substantiate the defendant's baseless allegations in relation to the missing plans in the Land Office file.

Ms Stella is obviously an important and material witness to the defendant but was not called by the defendant as a witness. In the circumstances, I am of the view that this is a proper case for me to invoke s. 114(g) of the Evidence Act 1950 against the defendant for not calling Ms Stella as a witness in that her evidence which could be and is not produced would if produced be unfavourable to the defendant who withholds it.

Moreover, the defendant had failed to cooperate with the plaintiff when the defendant refused to provide documents that were requested by the plaintiff in order that the plaintiff may follow up on the application. The defendant merely gave the plaintiff a Land Office file reference number and no other documents. The defendant had clearly shown a cavalier and lackadaisical attitude in the so-called application. I find as a fact that the defendant is clearly in breach of its implied duty in relation to the application for sub-division.

Specific Performance

Learned counsel for the plaintiff submits that since cl. 4(a) is a promissory condition and the defendant is in breach thereof, or alternatively the defendant is in breach of its implied duty to take all reasonable and necessary steps to apply for and obtain the relevant consent, the plaintiff is entitled to the remedy of specific performance.

On the other hand, the contention of the counsel for the defendant is as follows:

(1) The plaintiff cannot obtain specific performance in this case because the court cannot compel the State to give any consent. The granting of consent is a matter of policy for the State. Further the State is not a party to this suit.

(2) In any event, the agreement is void for want of consent of the State to enter into it. The agreement is clearly an attempt to "sell".

(3) Further, in the event that specific performance is decreed, the court is in effect directing the defendant to apply to the State Authorities when the defendant had already submitted an application for subdivision.

(4) The application for consent to transfer was to be made after the approval for subdivision and the issue of subdivided title. As the latter event has not occurred, the former cannot arise.

(5) The court has no power to extend time, and equitable principles do not apply to extend time. The effect of an order for specific performance is to extend time.

In my judgment, the starting point for specific performance is to be found in the presumption established by s. 11(2) of the Specific Relief Act 1954 in the following terms:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

In *Loke Koon Moy & Anor v. Zaibun Sa Binti Syed Ahmad* [1978] 2 MLJ 29, Chang Min Tat FJ (delivering the judgment of the Federal Court) referred to s. 11(2) of the Specific Relief Act 1954 and held that the burden of rebutting this presumption lay on the respondent (vendor). Upon appeal to the Privy Council, sub-nom. *Zaibun Sa binti Syed Ahmad v. Loke Koon Moy & Anor* [1982] 2 MLJ 92, it was held that specific performance would be ordered when "there was no sustainable objection that at any stage the conduct of the purchaser was such as to disentitle her to equitable relief." (emphasis added).

In the case before me, the plaintiff had at all material times fulfilled his obligations under the terms and conditions of the agreement. It is imperative and mandatory for the defendant to obtain the relevant consent but the defendant had failed to do so or at most had submitted the application in a cavalier and lackadaisical manner in order to render the whole exercise self-defeating, in that the material particulars as required by the State Authority were deliberately or otherwise omitted by the defendant.

In *Hassan v. Ismail* [1970] 1 MLJ 210, the appellant (vendor) was required under the agreement to apply for sub-division within a stipulated time and thereafter to transfer the land to the respondent (purchaser). The appellant failed to apply for sub-division and the respondent sought specific performance of the agreeement. In the Federal Court, the appellant (vendor) argued that the contract in question offended s. 37A of the Kelantan Land Enactment which provided that no land exceeding 250 square depa shall be sub-divided, unless the Sultan granted exemption from this restriction. The appellant also argued that the contract had become void since the date of its execution, as under s. 136(1)(p) of the National Land Code, no sub-division may be approved of any agricultural land if the land divided will be less than 1 acre. The Federal Court rejected the appellant's first argument by holding that the contract was not *void ab initio* as the prohibition under s. 37A was not absolute since the Sultan could grant an exemption. The Federal Court rejected the appellant's second argument and held that there were other provisions in the National Land Code empowering the proprietor to apply to the State Authority for removal of such restrictions and further held that unless the proprietor had done so, it could not be said that the contract in question was void or had become impossible. The Federal Court held by a majority that the respondent was entitled to specific performance and hence directed the appellant to make the application for change of the express condition and then apply for sub-division within two weeks of the judgment of the Federal Court and that the respondent be given liberty to apply should the appellant's application be unsuccessful.

In *Chin Tai v. Siow Shiow & Ors* [1971] 1 MLJ 67, the appellant/plaintiff had applied for a parcel of State Land and the application was approved in December 1956. She was given the issue document of title in March 1966. However, on 13 April 1960, before the title was issued, the appellant/plaintiff entered into an agreement in writing with the respondents/defendants whereby in consideration of a sum of RM149.50, the appellant/plaintiff agreed to assign all her rights and interest in the land to the first respondent/defendant and to execute a valid and registrable transfer within one month after receipt of the issue document of title. The agreement also provided that the first respondent/defendant enter into possession to use and enjoy the land. The appellant/plaintiff refused to execute the transfer after the issue document of title was issued in March 1966 and filed an action against the respondents/defendants claiming rescission of the agreement, possession of the land and damages. The respondents/defendants counter-claimed for specific performance. There was a restriction in interest on the land in that the land and the land alienated shall not be transferred, charged or leased for a period of 10 years, except with the express permission in writing of the Collector of Land Revenue, Jelebu. The Federal Court unanimously held that the contract of sale and purchase was valid and that the property could be transferred by way of specific performance. Since the only impediment to the transfer by way of specific performance was the requirement of the necessary permission, the Federal Court directed that the application for such permission may be made by the first respondent/first defendant, supported by a copy of the judgment of the Federal Court as grounds for the first respondent/first defendant's application and by virtue of the agreement. The Federal Court directed that, in the event of permission being granted and the appellant/plaintiff fails after fourteen days of notice received, to execute a registrable transfer, that the Assistant Registrar of the court shall do so in place of the appellant/plaintiff and call for the surrender of the title by the appellant/plaintiff. The Federal Court also directed that should permission be refused, the first respondent/first defendant should be entitled alternatively to damages.

In *Chong Hoong & Anor v. Wong Yuen Sang* [1976] 1 MLJ 282, the vendor as administrator agreed to sell a piece of land. The land in question was subject to a restriction in that it could not be transferred without the prior consent of the Ruler-in-Council, but the agreement did not allude to this requirement. The vendor had applied for the removal of this restriction which was approved on payment of a premium. The vendor failed to pay the premium and the approval for the removal of the restriction was withdrawn. The purchaser then commenced an action for specific performance. The vendor argued that the contract had been frustrated by the withdrawal of the approval for removal of the restriction. Chang Min Tat J (as he then was) held that

such a defence was not available to the vendor, as in the absence of any provision in the agreement, the premium had to be paid by the vendor in order to obtain a good and registrable title. The purchaser had applied for the removal of the restriction and obtained the approval. The High Court then ordered specific performance against the vendor subject to the approval of the court for the vendor to sell the property as an administrator.

In *Halimah binti Abdul Rahman v. Fatimah binti Abdullah* [1976] 2 MLJ 64, at the time of the execution of the agreement, the respondent was not the owner of the land but had applied to the state for the land and promised to complete the sale after she had obtained the title. Upon payment of RM300 towards the purchase price, the appellant was allowed to occupy the land. After the respondent had obtained the title, she refused to complete the sale. The High Court refused to grant specific performance on the grounds that the land had reverted to the State, the agreement being void having offended s. 195 of the Kedah Land Enactment relating to unlawful occupation of State land. On appeal to the Federal Court, Ali FJ was of the opinion that the agreement was a contingent contract within the meaning of s. 33(a) of the Contracts Act and was enforceable in law. Suffian LP was of the opinion that the sale was a conditional sale to be completed when the vendor's application had been approved by the State.

In the light of the above authorities, I hold that this court can order specific performance to compel the defendant to fulfil the terms and conditions undertaken by the defendant. In *Hasham v. Zenab* 16 [1960] AC 316 the Privy Council at p. 329 held as follows:

> The order for specific performance often falls into two parts.
>
> The first can be of a declaratory nature and the second contain consequential directions.

In view of the requirement of obtaining consent to sub-divide and to transfer under the agreement which has still not been obtained, this court will be unable to determine whether the defendant will be able to perform its obligations under the agreement to obtain the relevant consent. It would therefore be necessary to make an order for specific performance that is conditional upon obtaining the relevant consent as was done in the aforesaid cases. In *Principles of Equitable Remedies*, by I.C.F. Spry, 3rd Edn at p. 96, the learned author observed as follows:

> Indeed, in many cases it is uncertain even at the time of the hearing of proceedings whether performance of the obligations of the parties will be possible, and in these circumstance it may be found appropriate either to adjourn the hearing or else to make a conditional order that provides for the different eventualities.

In my view, it would be unjust and unconscionable for the defendant to profit from its own breach. The common and paramount intention of the parties to buy and sell the land should be given effect to so that the land may be sold at the price it was bargained for. Parties who have signed a written agreement must be made to carry out their part of the bargain to ensure that the express provisions are given full force and effect, and should not be allowed to renege from their contractual terms.

I therefore grant an order of specific performance of the agreement with the following consequential directions:

(i) That the defendant be hereby ordered, within 7 days from the date of this order, to take all appropriate measures to perfect the application for consent in accordance with the requirements and directions of the relevant authorities;

(ii) That the defendant be hereby ordered, within 7 days upon obtaining the consent for sub- division from the relevant authorities, to take appropriate measures in accordance with the requirements and directions of the relevant authorities to cause the issuance of a separate issue document of title at its own costs for the land purchased by the plaintiff from the defendant;

(iii) That the defendant be hereby compelled within 7 days from the date of issuance of the separate issue document of title to take appropriate measures in accordance with the requirements and directions of the relevant authorities to submit an application to obtain the consent to transfer the land to the plaintiff;

(iv) That the defendant supply to the plaintiff copies of all applications, supporting documents and correspondence submitted and duly acknowledged as received by the relevant authorities;

(v) That the defendant, upon the approval of the consent to sub-divide and transfer, comply with the relevant terms and conditions of the agreement;

(vi) Alternatively, if the consent for sub-division and consent to transfer is refused, an order that damages be paid to the plaintiff, such damages to be assessed by the Deputy Registrar of this court; and

(vii) Costs to the plaintiff, to be taxed.